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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91215751
Party	Defendant Skinny Pineapple, Inc.
Correspondence Address	ELIZABETH OLINER OLINER LAW 345 GROVE STREET, 2ND FLOOR SAN FRANCISCO, CA 94102 UNITED STATES liz@olinerlaw.com, hgw@wykowskilaw.com
Submission	Other Motions/Papers
Filer's Name	Elizabeth Oliner
Filer's e-mail	liz@olinerlaw.com
Signature	/EJO/
Date	07/07/2014
Attachments	THE FARM MOTION 7.7.14.pdf(888066 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Number [85658031](#); Published for Opposition on December 1, 2013

BB Farmaceuticals, Inc

Petitioner,

vs.

Skinny Pineapple, Inc.

Applicant

Opposition No. 91215751
Application No. 85/658,031
Trademark: THE FARM (+ design)

**APPLICANT’S MOTION TO SET ASIDE DEFAULT, OPPOSITION TO
PETITIONER’S MOTION FOR A DEFAULT JUDGMENT AND APPLICANT’S
ANSWER TO PETITIONER’S NOTICE OF OPPOSITION**

I. Introduction

Applicant, Skinny Pineapple, Inc. (“Skinny Pineapple”), by its undersigned attorneys, concurrently submits Applicant’s Motion to Set Aside Default Judgment and Applicant’s Opposition to Petitioner’s Motion for Default Judgment (collectively, “Applicant’s Motions”) pursuant to 37 C.F.R. § 2.116 (a) and Fed. R. Civ. P. 6 (b).

Along with Applicant’s Motions, Applicant submits the accompanying declaration of Elizabeth Oliner (“Oliner Decl.”), the exhibits attached hereto, and its Answer to Petitioner’s Notice of Opposition.

II. Statement of Facts

Skinny Pineapple, Inc. was previously represented in its trademark matters by Attorney Pamela Hirschman of Sheridan Ross, P.C. in Denver, Colorado. On May 12, 2014, Elizabeth Oliner and Henry Wykowski took over power of attorney for Skinny Pineapple’s trademark application for THE FARM (+ design), namely Serial No. 85/658,031 (Oliner Decl. 2). This was two days before Skinny Pineapple’s initial deadline to Answer the present Notice of Opposition. Given the short period of time, and the fact that neither Elizabeth Oliner nor Henry Wykowski had previously had an opportunity to review any of the files in the matter, the Applicant’s

counsel filed a request for a 30 day extension of time to Answer on May 13, so that the attorneys would have adequate time to prepare an Answer. (Oliner Decl. 3) In fact, it was not until May 14, 2014 when the present counsel received copies of Skinny Pineapple's files from the law firm of Sheridan Ross PC. (Oliner Decl. 4)

On Monday June 9, 2014, Ms. Oliner left for an eight-day trip to Spain. At the time when she left, the Board had not granted the extension of time to Answer. (Oliner Decl. 5) It was not until June 12, 2014 at 6:39 AM PST, which is 3:39 pm in Spain that the Board e-mailed Ms. Oliner, alerting her that the extension of time to oppose had been granted and the Answer was due the following day: June 13, 2014. (Oliner Decl. 6). Ms. Oliner did not see this email until the morning of June 13th and was not able to get in touch with her client, nor her co-counsel, under the circumstances. (Oliner Decl. 7) As such, the Applicant's attorneys filed for an additional 14-day extension of time to Answer on June 13, 2014. (Oliner Decl. 8)

During all of the time mentioned above, Petitioner's attorney, Daniel Holmander, never once reached out to Applicant's counsel. (Oliner Decl. 9) The first time when Ms. Oliner and Mr. Holmander had contact was on June 16, 2014, when Ms. Oliner sent email to Mr. Holmander after he had filed his motion for Default Judgment. In the email, Ms. Oliner explained that she was in Spain and they arranged to speak when she returned to the U.S. It was not until June 24, 2014 that Ms. Oliner and Mr. Holmander were able to speak. (See Exhibit A). Shortly, after their conversation, Mr. Holmander sent a proposed settlement. (Oliner Decl. 10).

III. Legal Argument

When considering whether to open or set aside judgment, the Board's policy is laid out in TBMP § 312.02 as follows:

Good cause why default judgment should not be entered against a defendant, for failure to file a timely answer to the complaint, is usually found when the defendant shows that (1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action. The showing of a meritorious defense does not require an evaluation of the merits of the case. All that is required is a plausible response to the allegations in the complaint.

The determination of whether default judgment should be entered against a party lies within the sound discretion of the Board. In exercising that discretion, the Board must be mindful of the fact that it is the policy of the law to decide cases on their merits. *Accordingly, the Board is very reluctant to enter a default judgment for failure to file a timely answer, and tends to resolve any doubt on the matter in favor of the defendant.*

A. No willful conduct or gross neglect

Ms. Oliner and Mr. Wykowski did not engage in any willful conduct or gross neglect. They were appointed as attorneys two days before the initial answer was due and as new counsel, they needed time to obtain and review the relevant files. As such, they filed a request for an extension 30 days to file an Answer, requesting that the Time to Answer be extended until June 13, 2014. The Board did not grant this extension until June 12, 2014, when it stated that the Answer was due on “June 13, 2014.” A single day was not adequate time for the Applicant’s attorneys to respond, especially given that Ms. Oliner was in Spain at the time when she received notice that the extension was granted.

In view of the above, the Applicant submits that the delay in filing an Answer is not the result of willful conduct or gross neglect, but rather was inadvertent and was due, in part, to the Board’s delay in granting the extension initially requested.

B. No substantial prejudice to Petitioner

Petitioner has not shown any reason why it is prejudiced by the Applicant’s failure to file an Answer. One of the only points of contention that Petitioner asserted in its Motion for Default Judgment was that “Applicant’s counsel has not once contacted Opposer’s counsel.” This no longer is the case, as Ms. Oliner and Ms. Hollmander have spoken.

Further, Petitioner initiated this proceeding on April 4, 2014, approximately three months ago. Thus, Petitioner’s argument, that Applicant has had 6 months to prepare an Answer, has no merit and certainly does not amount to a viable claim of “substantial prejudice”.

Based on the above, the claimed delay by Applicant in filing an Answer has not prejudiced Petitioner.

C. A meritorious defense to the action exists

The Applicant is filing an Answer to the Notice of Opposition. This is included in the present filing. The Board typically has considered the filing of an answer as satisfactory evidence of a meritorious defense.¹ Thus, the Answer included herein satisfies this third requirement.

IV. Conclusion

It has generally been said that default judgment is an extreme sanction, and a “weapon of last and not first, resort.” *Martin v. Coughlin*, 895 F. Supp 39 (N.D.N.Y. 1995). There is no reason in this situation for the Board to depart from the longstanding policy of favoring cases to be determined on their merits, as laid out in TBMP § 312.02. Accordingly, the Applicant respectfully requests that the default entered in this matter be set aside, that Opposer’s motion for Default Judgment be denied, and that the Board accept the Answer to the Notice of Opposition, which follows.

1. ¹ The Answer that is being filed contemporaneously with this motion contains denials of Petitioner’s key allegations as well as affirmative defenses, *inter alia*: 1) “No likelihood of confusion, deception or mistake exists between Petitioner’s FARMAESTHETICS mark and Applicant’s THE FARM (+ design mark) because the marks are different in sight, sound, meaning and commercial impression”; and 2) “Petitioner lacks standing to oppose Applicant’s mark in that Petitioner is not likely to be harmed by the registration of Applicant’s mark.” This showing easily surpasses the “*plausible response to the allegations*” standard of TBMP § 312.02.

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BB Farmaceuticals, Inc

Petitioner,

vs.

Skinny Pineapple, Inc.

Applicant

Opposition No. 91215751
Application No. 85/658,031
Trademark: THE FARM (+ design)

APPLICANT’S ANSWER TO PETITIONER’S NOTICE OF OPPOSITION

Skinny Pineapple, Inc., a corporation organized under the laws of Colorado and located at 1321 College Avenue, Suite 2000 in Boulder Colorado 80302 responds, solely for the purpose of this proceeding, to each of the grounds set forth in Petitioner’s Notice of Opposition, as follows:

ANSWER TO COUNT ONE

1. Denied.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Applicant admits that it is the owner of the website, www.thefarm.co. However, none of allegations contained in this paragraph are relevant to the application that Applicant filed in International Trademark Class 3 for “beauty products, namely, face and body lotion, essential oils, body oils, bath oils, oils for cosmetic purposes, soap, bath salts, bubble bath

and petroleum jelly for cosmetic purposes; beauty products made with hemp, namely, face and body lotion, essential oils, body oils, bath oils, oils for cosmetic purposes, soap, bath salts, bubble bath and petroleum jelly for cosmetic purposes.”

7. Denied.

8. Denied.

9. Denied.

ANSWER TO COUNT TWO

10. Denied.

11. Admitted.

12. Admitted.

13. Denied.

14. Deny any implication that the hemp used in Applicant’s beauty products is prohibited under the CSA as a “marijuana or marijuana based preparation”. Notwithstanding the foregoing, the remaining allegations contained in Paragraph 14 are admitted.

15. Admitted. Though, Applicant would like to clarify that its beauty products are made with hemp seed oil.

16. Denied and/or not relevant on the basis that the other products offered for sale on the Applicant’s website are not relevant to its current trademark application for serial no. 85/658,031 in connection with beauty products in International Trademark Class 3.

17. Denied and/or not relevant on the basis that the other products offered for sale on the Applicant’s website are not relevant to its current trademark application for serial no. 85/658,031 in connection with beauty products in International Trademark Class 3.

18. Denied. The products listed its Applicant's trademark for serial no. 85/658,031 are not prohibited by the CSA.

19. Denied.

20. Denied.

ANSWER TO COUNT THREE

21. Admitted.

22. Admitted.

23. Admitted.

24. Applicant does not have enough information to admit or deny the information and therefore, must deny.

25. Denied.

26. Denied.

27. Denied.

28. Applicant admits that if its registration is granted, it will have the prima facie right to use the Mark THE FARM (& design) in connection with the specific goods listed in Trademark serial no. 85/658,031. Applicant denies all the remaining allegations in this paragraph.

29. Denied.

AFFIRMATIVE DEFENSES

1. The Petition fails to state a claim upon which relief can be granted.

2. No likelihood of confusion, deception or mistake exists between Petitioner's FARMAESTHETICS mark and Applicant's THE FARM (+ design mark) because the marks are different in sight, sound, meaning and commercial impression.

3. Petitioner lacks standing to oppose Applicant's mark in that Petitioner is not likely to be harmed by the registration of Applicant's mark.
4. Applicant reserves the right to assert any additional defenses, should Applicant learn of grounds for such defenses during the course of this Opposition Proceeding.

Registrant respectfully requests that the Petition for Cancellation be denied.

Signed,

/EJO/

Elizabeth Oliner
July 7, 2014

/HGW/

Henry G. Wykowski
July 7, 2014

Certificate of Mailing and Service

The Attorneys for the Applicant certify that on July 7, 2014, the foregoing is being served by mailing and e-mail a copy thereof by certified mail addressed to the attorneys for Petitioner:

DANIEL J HOLMANDER
BARLOW JOSEPHS & HOLMES LTD
101 DYER STREET , 5TH FLOOR
PROVIDENCE, RI 02903
UNITED STATES

djh@barjos.com, tm@barjos.com, clc@barjos.com

Signed,

/EJO/

Elizabeth J. Oliner
July 7, 2014

/HGW/

Henry G. Wykowski
July 7, 2014

ATTORNEYS FOR Applicant

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Petitioner,

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Applicant

Opposition No. 91215751
Application No. 85/658,031
Trademark: THE FARM (+ design)

**DECLARATION OF ELIZABETH OLINER IN SUPPORT OF APPLICANT'S MOTION
TO SET ASIDE DEFAULT, OPPOSITION TO PETITIONER'S MOTION FOR A
DEFAULT JUDGMENT**

I, Elizabeth Oliner, hereby declare as follows:

1. I am an attorney licensed to practice law in the State of California. I, along with my colleague Henry Wykowski, represent Skinny Pineapple, Inc. ("Skinny Pineapple" and/or "the Applicant") in the above-captioned proceeding. I have personal knowledge of the facts stated herein and could testify competently to them if called to do so.
2. Previously, Pamela Hirschman of the law firm Sheridan Ross, P.C. represented the Applicant in its trademark matters. Henry Wykowski and I took over power of attorney in this proceeding and for Skinny Pineapple's trademark application Serial No. 85/658,031 for THE FARM (+ design) on May 12, 2014.
3. Prior to taking over power of attorney on May 12, 2014, neither Henry Wykowski nor I had reviewed any of the files related to the matter. Given that Answer to the notice of the Opposition was due on May 13, 2013, we filed a request for a 30-day extension of time to Answer the Notice of Opposition on May 12, 2014.
4. It was not until May 14, 2014 that Mr. Wykowski and I received the Applicant's files from Ms. Hirschman, the Applicant's previous attorney.
5. I left California on Monday, June 9, 2014 on an eight-day trip to Spain on Monday June 9, 2014. When I left the Board had not yet granted the Applicant's requested extension of time to Answer.

6. When the time was 3:39 pm in Spain on June 12, 2014, the Board sent an e-mail, alerting me that the extension of time to oppose had been granted and the Answer was due the following day: June 13, 2014.

7. I did not see the Board's email granting the extension until the morning of June 13, 2014 and was unable to get in touch with the Applicant and Mr. Wykowski at that time.

8. I filed an additional 14-day extension of time to Answer on June 13, 2014

9. I did not hear from the Petitioner's attorney, Daniel Holmander until June 16, 2014, when I reached out to him via email. I had not heard from Mr. Holmander before this time. In the June 16th email, I explained that I was in Spain and we arranged to speak when I returned to the U.S. A true and correct copy of the June 16, 2014 email exchange is attached as Exhibit A.

10. In the email, Ms. Oliner explained that she was in Spain and they arranged to speak when she returned to the U.S. It was not until June 24, 2014 that Ms. Oliner and Mr. Holmander were able to speak.

11. Shortly after my June 24th conversation with Mr. Holmander, he sent over a proposed settlement agreement.

12. Applicant files its proposed Answer herewith. As set forth in the Answer, Applicant believes it has meritorious defenses to Petitioner's Opposition, and it fully intends to defend this case on the merits.

I declare under penalty of perjury under the laws of the State of California and the laws of the United States that the foregoing is true and correct.

Executed in San Francisco, California this 7th day of July, 2014.

/EJO /
Elizabeth Oliner

Certificate of Mailing and Service

The Attorneys for the Applicant certify that on July 7, 2014, the foregoing is being served by mailing and e-mail a copy thereof by certified mail addressed to the attorneys for Petitioner:

DANIEL J HOLMES ANDER
BARLOW JOSEPHS & HOLMES LTD
101 DYER STREET , 5TH FLOOR
PROVIDENCE, RI 02903
UNITED STATES

djh@barjos.com, tm@barjos.com, clc@barjos.com

Signed,

/EJO/

Elizabeth J. Oliner
July 7, 2014

/HGW/

Henry G. Wykowski
July 7, 2014

ATTORNEYS FOR Applicant

EXHIBIT A



Liz Oliner <liz@olinerlaw.com>

THE FARM

13 messages

Liz Oliner <liz@olinerlaw.com>

Fri, Jun 13, 2014 at 10:42 AM

To: Daniel Holmander <djh@barjos.com>, tm@barjos.com, clc@barjos.com

Please see the attached.

—

345 Grove Street, 2nd Floor

San Francisco, CA 94102

[650.549.5298](tel:650.549.5298)[646.239.2969](tel:646.239.2969) (mobile number)[866.401.5985](tel:866.401.5985) (fax number)

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**THE FARM extension of time to respond June 13.pdf**

84K

Liz Oliner <liz@olinerlaw.com>

Mon, Jun 16, 2014 at 9:26 AM

To: Daniel Holmander <djh@barjos.com>, tm@barjos.com, clc@barjos.com

FRE 408 Applies

Dear Daniel:

I am currently in Spain--which is where I was when I received the order that the board granted our extension of time to answer and it was not feasible for me to answer or get a hold of my client in that time, given the time zone differences between Europe and Colorado/California.

I'm sorry that we did not contact you earlier, but I only was just brought on as counsel two days before the other deadline to answer was due and I had not received any files from the previous counsel until then to even review.

I honestly did not even have a copy of the Notice of Opposition that was filed because it was not showing up online on TTABVUE for some reason.

I would like to be able to deal with you in good faith in this opposition proceeding. Again, I am in Spain (where I have been for a week) and will be back in the US tomorrow if my flight does not get cancelled (it was cancelled today and I can send you the proof of my flights on United if you would like) . If you'd like to arrange a phone call next week, I'd be happy to do so.

If you would consider revoking your motion for summary judgement and consenting to an extension of time to answer until I am at least back in the US for more than 24 hours, I would greatly appreciate it.

Best,

Liz Oliner

[Quoted text hidden]

Daniel J. Holmander <DJH@barjos.com>

Mon, Jun 16, 2014 at 9:47 AM

To: Liz Oliner <liz@olinerlaw.com>

[Liz – call me when you return. I am open to discussing.](#)

Dan

From: Liz Oliner [mailto:liz@olinerlaw.com]
Sent: Monday, June 16, 2014 12:27 PM
To: Daniel J. Holmander; TM Info; Carrie Coyne
Subject: Re: THE FARM

[Quoted text hidden]

Liz Oliner <liz@olinerlaw.com>
To: "Daniel J. Holmander" <DJH@barjos.com>, Liz Oliner <liz@olinerlaw.com>

Mon, Jun 16, 2014 at 10:28 AM

Thanks for the note, Daneil.

As soon as I get back (which I hope is tomorrow evening), I will give you a call. Probably on Wednesday.

Best,
Liz

[Quoted text hidden]

Liz Oliner <liz@olinerlaw.com>
To: "Daniel J. Holmander" <DJH@barjos.com>

Thu, Jun 19, 2014 at 8:27 AM

Hi Daniel:

I just called your office and understand there is an issue with the phones and that you are at a meeting.

I'm back in the US (in NYC for the rest of the week). If you have a moment, please try me on my cell phone which is [646 239 2969](tel:6462392969). I have several meetings today so if you miss me, feel free to leave a message. I'm also available tomorrow afternoon at any time, if it is easier to schedule a time.

Thanks.

Best,
Liz

On Mon, Jun 16, 2014 at 9:47 AM, Daniel J. Holmander <DJH@barjos.com> wrote:

[Quoted text hidden]

[Quoted text hidden]

Daniel J. Holmander <DJH@barjos.com>
To: Liz Oliner <liz@olinerlaw.com>

Thu, Jun 19, 2014 at 8:31 AM

I am at annual bar meeting today and tomorrow

How about Monday morning?

Sent from my iPhone

[Quoted text hidden]

Liz Oliner <liz@olinerlaw.com>
To: "Daniel J. Holmander" <DJH@barjos.com>

Thu, Jun 19, 2014 at 8:34 AM

Sure--I am back in San Francisco on Monday and happy to chat then. Does 9:30 PST work?

Best,
Liz

[Quoted text hidden]

Daniel J. Holmader <DJH@barjos.com>
To: Liz Oliner <liz@olinerlaw.com>

Fri, Jun 20, 2014 at 9:29 AM

I am out of office Monday from 12 EST onward.

How about Tuesday at 12:30 EST (9:30PST)?

From: Liz Oliner [mailto:liz@olinerlaw.com]
Sent: Thursday, June 19, 2014 11:34 AM
To: Daniel J. Holmader
Subject: Re: THE FARM

[Quoted text hidden]

Liz Oliner <liz@olinerlaw.com>
To: "Daniel J. Holmader" <DJH@barjos.com>

Fri, Jun 20, 2014 at 10:05 AM

Yes that works. Thanks

Sent from my iPhone

[Quoted text hidden]

Liz Oliner <liz@olinerlaw.com>
To: "Daniel J. Holmader" <DJH@barjos.com>

Tue, Jun 24, 2014 at 7:59 AM

Hi Daniel:
Does 9:30 PST today still work?

Best,
Liz Oliner

[Quoted text hidden]

Daniel J. Holmader <DJH@barjos.com>
To: Liz Oliner <liz@olinerlaw.com>

Tue, Jun 24, 2014 at 8:03 AM

How about now? [401 273-4446](tel:4012734446) x103

From: Liz Oliner [mailto:liz@olinerlaw.com]
Sent: Tuesday, June 24, 2014 11:00 AM

[Quoted text hidden]

[Quoted text hidden]

Liz Oliner <liz@olinerlaw.com>
To: "Daniel J. Holmader" <DJH@barjos.com>

Tue, Jun 24, 2014 at 8:03 AM

Does half an hour from now work actually?

[Quoted text hidden]

Daniel J. Holmader <DJH@barjos.com>
To: Liz Oliner <liz@olinerlaw.com>

Tue, Jun 24, 2014 at 8:08 AM

Let's keep at 930 PST

From: Liz Oliner [mailto:liz@olinerlaw.com]
Sent: Tuesday, June 24, 2014 11:04 AM

[Quoted text hidden]

[Quoted text hidden]